No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

JAY D. GECK
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
(360) 753-6200
noahp@atg.wa.gov

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INTRODUCTION

Washington's fuel tax does not violate the Yakama Nation's "right, in common with citizens of the United States, to travel upon all public highways." It applies off reservation per gallon of fuel possessed "regardless of whether Cougar Den uses the highway." Pet. App. 13a. Cougar Den would owe exactly the same tax if it transported fuel by private toll road, barge, or pipeline.

Cougar Den seeks to obscure this simple conclusion in two ways. Both fail.

First, Cougar Den claims that the Treaty creates a right much broader than what it says. Citing *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), and this Court's decisions interpreting different treaty language, the company argues that the highway-travel clause implicitly creates a right to transport goods *without taxation of those goods*. But until the courts below, no court had ever reached that conclusion, which finds no support in precedent or the Treaty's text or history.

Second, Cougar Den portrays Washington's fuel tax as a tax on travel by mischaracterizing state law. But Cougar Den cannot show that its tax burden turned in any way on use of public highways. Pet. App. 13a. This is not a tax on highway travel and thus is not a tax on the "very right" reserved in the Treaty. *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

This Court should reverse.

ARGUMENT

A. The Yakama Treaty Creates No Right to Transport Goods Without Taxation of Those Goods

Unable to prevail under the Yakama Treaty's language, Cougar Den first asks the Court to skip past that language. The company claims that decisions interpreting another treaty clause and legal conclusions in a district court decision create an implied right to transport goods without taxation of those goods. Cougar Den's approach ignores longstanding rules of Indian law, and the authorities it cites cannot bear the weight it claims.

1. Longstanding rules of Indian law control here and forbid adding unwritten rights to treaties

"[T]he starting point" for determining if an Indian treaty creates a particular right "is the treaty language itself." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).[1] The language is "interpreted in light of the parties' intentions," with ambiguities resolved in the Indians' favor. *Id.* But treaty rights must be rooted in text; this Court has consistently refused to add unwritten rights to treaties based solely on alleged understandings. *See, e.g., Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770-71 (1985) (rejecting claim of right not mentioned in treaty text); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432

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[1] *See also Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("[I]nterpretation of a treaty, like the interpretation of a statute, begins with its text.").

(1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to . . . achieve the asserted understanding of the parties.").

The Court has been especially careful about requiring a textual basis for claimed rights that would interfere with off-reservation taxes. "[W]hen a State asserts its taxing authority outside of Indian country," Indians going beyond reservation boundaries are subject to non-discriminatory state taxes "'[a]bsent express federal law to the contrary.'" *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112-13 (2005) (second alteration in original) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

Cougar Den never even argues that it can prevail under the "express-federal-law" rule, and understandably so: the Treaty contains no language about trade, transporting goods, taxes, or anything else exempting Yakamas from Washington's fuel tax. Instead, the company offers several arguments to escape this rule. None succeeds.

First, Cougar Den claims that the "express-federal-law" rule conflicts with *Tulee*, 315 U.S. 681, which invalidated Washington's fishing license fee as to Yakama Indians. Resp. 51. But this Court cited *Tulee* as an example *applying* the "express-federal-law" rule in *Mescalero*, 411 U.S. at 148-49, and with good reason. The treaty in *Tulee* contained an express "right of taking fish," and Washington's fee burdened that "very right." 315 U.S. at 685.

Tulee also rebuts Cougar Den's strawman argument that the State is claiming that a treaty must "'clearly' and 'unambiguously' refer[] to *taxes*" to preempt state taxes. Resp. 51. The State never said that, and as *Tulee* shows, a tax may be preempted if it burdens the "very right" the treaty creates, even if the treaty never mentions taxes. 315 U.S. at 685. But that does not mean treaties can preempt taxes on activities never mentioned.

Cougar Den also errs in claiming that the "express-federal-law" rule conflicts with normal rules of treaty interpretation, such as considering intent or construing ambiguities in tribes' favor. Resp. 52. This Court routinely applies these rules with the "express-federal-law" principle. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465-66 (1995); *Klamath*, 473 U.S. at 765 & n.16. But intent alone cannot create a right nowhere mentioned in the "express federal law" of treaty language. *See, e.g., Choctaw Nation*, 318 U.S. at 432.

Cougar Den goes on to claim that *Mescalero*'s "express-federal-law" rule applies only to interpreting statutes, not treaties. Resp. 54-55. But this Court has never said that, and it has cited the *Mescalero* rule in treaty-interpretation cases. *See, e.g., Chickasaw Nation*, 515 U.S. at 465; *Klamath*, 473 U.S. at 765 & n.16. Moreover, when the *Mescalero* Court held that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State" "[a]bsent express federal law to the

contrary," it cited a number of treaty cases to support the point, including *Tulee*. *Mescalero*, 411 U.S. at 148-49 (citing *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968); *Tulee*, 315 U.S. at 683).[2]

Finally, Cougar Den cites *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164 (1973), to claim that the "express-federal-law" rule is "irreconcilable" with the rule that States generally cannot tax reservation lands and reservation Indians. Resp. 52-53. But *McClanahan* was decided the same day as *Mescalero* and emphasized that, for historical reasons unrelated to treaty language, rules for taxing Indians outside a reservation differ starkly from rules for on-reservation taxation. 411 U.S. at 168; *see also, e.g.*, Opening Br. 18-24; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980) (citing *Mescalero* in explaining that state authority "outside the reservation . . . is considerably more expansive than it is within reservation boundaries").

In sum, the "express-federal-law" rule applies here, and Cougar Den effectively concedes it cannot prevail under that standard.

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[2] Cougar Den also claims the Court should treat state and federal taxes differently. Resp. 55-57. Again, this Court has never said that. Indeed, in *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), the Court held a state income tax applied to an Indian's income from mineral leases for the same reasons the federal income tax did. And although *Mescalero* dealt with state taxes, it cited federal tax cases in explaining that exemptions are not granted by implication. 411 U.S. at 156.

2. Cases interpreting the "right of taking fish" create no right to transport goods without taxation of those goods

Seeking to escape the rule that only express federal law preempts off-reservation taxes, Cougar Den claims that this Court's cases interpreting the Yakama Treaty's "right of taking fish" require a different approach. The company argues that because this Court has interpreted the fishing clause to exempt Yakamas from non-discriminatory fees on fishing, it must interpret the highway-travel clause to exempt Yakamas from non-discriminatory taxes on goods transported by highway. Resp. 19-27. This argument fails on two levels.

First, even if the fishing cases controlled here, they provide no basis for exempting Cougar Den from Washington's fuel tax. *Tulee* held that the "right of taking fish" preempts non-discriminatory charges for exercising that "very right." 315 U.S. at 685. Here, the "very right" the Treaty protects is "travel upon all public highways." Washington's fuel tax does not tax "travel upon all public highways." *Infra* 16-21. It taxes fuel possession "regardless of whether Cougar Den uses the highway." Pet. App. 13a.

To bridge this gap in its reasoning, Cougar Den claims that the Treaty implicitly creates a "right to transport . . . goods on the highway." Resp. 20. It argues that this right must be inferred based on *Yakama Indian Nation*, 955 F. Supp. 1229. Cougar Den is wrong, as detailed below. *Infra* 10-15. But even if there were an implicit right "to transport goods on

the highway," Washington's fuel tax would not burden that "very right." It is not a tax on "transporting goods by public highway," it is a tax on the goods themselves (fuel) that applies "regardless of whether Cougar Den uses the highway." Pet. App. 13a; *infra* 16-21.

The distinction between a tax on "transporting goods by highway" and a tax on the goods themselves is meaningful. This Court has often drawn similar distinctions. For example, *Mescalero* held that although federal law preempted a state tax on "permanent improvements" on land, it did not preempt taxing income the Tribe earned from the land, because "[o]n its face, the statute exempts land and rights in land, not income derived from its use." 411 U.S. at 158, 155; *see also, e.g.*, *Superintendent of Five Civilized Tribes v. Comm'r of Internal Revenue*, 295 U.S. 418, 421 (1935) (holding tax exemption for land did not extend "to income derived from investment of surplus income from [the] land").

The second flaw in Cougar Den's reasoning is that the history and text of the fishing and highway-travel clauses differ substantially, limiting the relevance of fishing-clause cases here.

As to history, the Court has emphasized in interpreting the fishing clause that it protected pre-existing rights that had always belonged exclusively to Indians. *See Tulee*, 315 U.S. at 684 (describing the fishing clause as conferring "continuing rights" preserving the tribes' "immemorial customs"); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. 658, 676-79 (1979); *United States v. Winans*, 198 U.S. 371, 381-82 (1905). By contrast, while Yakamas had long traveled on rivers and trails, the right "to travel upon all public highways" was new, addressing travel on future highways built by the government. U.S. Br. 29 n.6. Cougar Den acknowledges as much, recognizing that "[t]he Yakamas of 1855 traveled on Indian trails," not public highways. Resp. 32. The Treaty's text and negotiating history confirm a forward-looking right. The text provided that "roads may be run through the said reservation," JA 80a, and guaranteed the tribe a reciprocal right of access to future highways, and the negotiators emphasized that the highway-travel right was new. *See, e.g.*, JA 66a ("[A]s we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country[.]").

Textual differences amplify these historical differences. Cougar Den emphasizes that both clauses use the phrase "in common with," but that phrase modifies different things in the two clauses. The fishing clause promises "the right of taking fish at all usual and accustomed places, in common with citizens[.]" JA 81a. Thus, "in common with" modifies "taking fish," not the "right"—Indians and non-Indians will take fish in common, but will not have the same right in common. *See* Statement as to Jurisdiction, *Tulee v. Washington*, No. 318, 1941 WL 52780, at *29 (U.S. June 30, 1941); *Fishing Vessel*, 443 U.S. at 677-78. By contrast, the highway-travel clause guarantees "the right, in common with citizens of the United States, to travel upon all public

highways." JA 80a-81a. Here, "in common with" modifies "right"—the right itself is shared in common.[3]

In any event, this Court held decades ago that it was "*despite the phrase* 'in common with citizens of the territory'" that the fishing clause "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy[.]" *Tulee*, 315 U.S. at 684 (emphasis added). The Court put "greater importance" on "other words in the treaties," especially "the right of *taking* fish," which had to be interpreted against the historic backdrop of Indians' exclusive right to fish. *Fishing Vessel*, 443 U.S. at 678. As just explained, there is no such historic backdrop to highway travel. And here, "other words in the treaty" confirm that the highway-travel right is narrower than Cougar Den claims. The highway-travel right comes immediately after a clause promising "free access from [the Reservation] to the nearest public highway[.]" JA 80a. Clearly, the "right, in common with citizens of the United States" meant something different than "free access." *See* U.S. Br. 29.

Cougar Den claims the highway-travel clause would be meaningless if it guaranteed Yakamas only the right to travel on non-Indian roads like non-Indians. Resp. 25. The Court need not decide whether the highway-travel clause gives Yakamas rights beyond those of others, because Cougar Den loses even

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[3] *See* Pet. 28 n.7 (discussing U.S. Brief in Opposition in *Ramsey v. United States*, No. 02-1547).

if Yakamas have a special right to travel without taxation of *that travel*. But Cougar Den is wrong in any event. At the time of the Yakama Treaty, state and federal policies sometimes prevented tribes from leaving their reservations. Opening Br. 38. This clause protected the Yakama against such policies. Two amici tribes with an identical highway-travel clause confirm the importance of the treaty right as written, citing how Governor Stevens invoked the clause to prevent people from blocking Nez Perce Indians traveling on a major road. Nez Perce/CSKT Br. 23-27.

In short, nothing in this Court's fishing-clause decisions justifies rewriting the highway-travel clause to create rights it never mentions.

3. The district court's findings in *Yakama Indian Nation* create no right to transport goods without taxation of those goods

Cougar Den's extraordinary reliance on *Yakama Indian Nation*, 955 F. Supp. 1229, is equally unavailing. Cougar Den is free to cite facts from that decision, but the relevance of those facts and the Treaty's ultimate meaning are legal questions for this Court. Cougar Den thus errs in relying on *Yakama Indian Nation* to support a central premise in its brief: that the highway-travel clause creates an independent "right to transport goods" that amounts to express federal law preempting taxation of those goods. Resp. 20.

Cougar Den repeatedly cites legal conclusions from *Yakama Indian Nation*,[4] but treaty interpretation is an issue of law reviewed de novo. *See, e.g.*, *Klamath*, 473 U.S. at 766 (rejecting lower courts' interpretation of treaty without deference); *Winans*, 198 U.S. at 380-82 (same). And this Court routinely conducts its own analysis of the historical record in treaty cases to determine the parties' intent and understanding, without deference to lower courts. *See, e.g.*, *Chickasaw Nation*, 515 U.S. at 455, 466-67 (analyzing parties' understanding of treaty language and rejecting lower courts' interpretation, even though those courts had "endeavored to 'rea[d] the treaty as the Indians [who signed it] would have understood it'" (alterations in original)); *Fishing Vessel*, 443 U.S. at 675-78; *Tulee*, 315 U.S. at 684-85.

It is thus remarkable that Cougar Den relies on *Yakama Indian Nation* as its sole authority to assert an "established proposition" that the highway-travel clause provides a right to "transport . . . goods." Resp. 20. The Court need not decide whether the Treaty creates such a right, because Washington taxes fuel possession, not fuel transportation. *See infra* 16-21. Regardless, *Yakama Indian Nation* provides no basis for inferring such a right for several reasons.

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[4] *See, e.g.*, Resp. 23 (citing *Yakama Indian Nation* about the meaning of treaty language), 24 (citing *Yakama Indian Nation* for the proposition that the Treaty guarantees "the right to travel on all public highways without being subject to any licensing and permitting fees"), 30 (citing legal reasoning from *Yakama Indian Nation*).

First, as just explained, whether the Treaty creates a right to transport goods is a legal question, not one meriting deference to a lower court. Even the district court's statements about how the Yakama understood the Treaty are based primarily on treaty language and the minutes of the treaty council, materials this Court can review itself. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 675-78; *Tulee*, 315 U.S. at 684-85.[5]

Second, *Yakama Indian Nation* addressed a narrow question quite different from the issue here. The case involved truck licensing fees charged as a pre-condition to highway use, 955 F. Supp. at 1232-33, i.e., "fees imposed *for use of* the public highways," *id.* at 1253 (emphasis added). It did not consider a tax on goods, like the one here, that does not depend on highway use. Pet. App. 13a. Moreover, that case involved what the court called "tribal goods," namely, timber cut on the Yakama Reservation. *Yakama Indian Nation*, 955 F. Supp. at 1232-33. The court repeatedly couched its conclusions as addressing state fees on "hauling tribal goods to market." *Id.* at 1249, 1235, 1245, 1262, 1267. Any conclusions beyond this situation are dicta.

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[5] The district court also based its conclusions about likely Yakama understanding on testimony from a tribal member born 70 years after the Treaty was signed. *Yakama Indian Nation*, 955 F. Supp. at 1236-37, 1247. That purported understanding was contradicted by decades of conduct by the parties. *See, e.g.*, *id.* at 1254-55 (noting that the Yakamas paid vehicle registration fees for decades without dispute and never asserted a right to avoid state laws under the highway clause until the 1980s).

Third, Cougar Den's reasoning proves too much. The company argues that *Yakama Indian Nation* demonstrates a right to transport goods for trade because of two conclusions it reached: (1) trade was important to the Yakama; and (2) treaty negotiators said the Yakama could continue to travel to trade. Resp. 20. But those same conclusions are true for many other activities that the highway-travel right facilitates. For example, fishing and hunting were vitally important to the Yakama, and the treaty negotiators said that the Yakama could continue to travel for these purposes.[6] But that does not mean that the highway-travel right created a right to fish or hunt. Instead, the Treaty includes separate clauses protecting those rights, clauses that would have been unnecessary if the highway-travel right already protected them. Similarly, although one of the purposes of the highway-travel clause was to allow the Yakama to trade, Cougar Den admits (contrary to decades of arguments by the Yakama Nation) that the Treaty creates no stand-alone right to trade, and that the State can tax off-reservation Yakama trade. Resp. 35-36. Thus, just because the highway-travel right facilitates important activities like trade, fishing, and transporting goods, does not mean it creates rights to engage in those activities. While the highway-travel

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[6] *See, e.g., Yakama Indian Nation*, 955 F. Supp. at 1239 ("Travel was essential with respect to the Yakamas' custom of taking fish."), 1240 ("You will be allowed to go to the usual fishing places . . . ."), 1263.

right *applies* when Yakamas transport goods for trade, just as it applies when they travel to fish, hunt, or visit family, that does not mean it creates a *right* to transport goods for trade.

Cougar Den seeks to avoid the multitude of problems with *Yakama Indian Nation* by claiming that the State is "collaterally estopped" from challenging its findings. Resp. 17. Nonsense. Cougar Den's argument is based on statements by the administrative law judge and superior court below. Both are irrelevant. In Washington, when an agency director reviews an ALJ's decision (as here), the director's decision becomes the agency's decision, including as to facts. *See Tapper v. Emp't Sec. Dep't*, 122 Wash. 2d 397, 404 (1993) (citing Wash. Rev. Code 34.05.464(4)). The Director of the Department of Licensing never relied on factual findings from *Yakama Indian Nation* in her decision; instead, she distinguished its reasoning. Pet. App. 44a-61a. The State therefore had no reason to quibble with the agency's decision when Cougar Den sought judicial review in superior court. And the superior court's statements about *Yakama Indian Nation* became irrelevant once the State appealed that court's decision to the Washington Supreme Court; under Washington law, an appellate court "sits in the same position as the superior court," directly reviewing the agency's decision, not the superior court ruling. Pet. App. 4a; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wash. 2d 909, 915 (2008).

In short, nothing in *Yakama Indian Nation* controls here, and nothing in the decision creates or even addresses the right Cougar Den claims: to escape taxes on goods simply because they are transported by highway.

4. Transporting goods in the "ceded area" does not make them exempt from tax

In a final effort to expand the highway-travel clause beyond its text, Cougar Den makes a confusing argument about its "preexisting tax exemption" in the "ceded area." Resp. 28-35. The company's argument seems to be that because there were no state taxes within the Yakama's historic territory at treaty time, the State cannot tax goods the Yakama transport within that territory today. This argument contradicts basic tenets of Indian law and cannot withstand scrutiny.

Virtually nothing the Yakama did in 1855 was taxed, but that does not mean the Yakama are exempt from taxes today. For example, a Yakama member farming in the Tribe's historic territory would have faced no federal income taxes or state taxes before 1855. But a Yakama farmer today is unquestionably subject to tax if he lives outside the Yakama Reservation, even if he lives in the area ceded by the Tribe. Whether the land is "ceded territory" makes no difference. Cougar Den's reliance on the principle that "Indians are immune from state tax based on their activity in Indian country" is a red herring. Resp. 30. "Indian country" and "ceded territory" are not the same thing. *See* 18 U.S.C. § 1151 (defining "Indian country").

Cougar Den seems to suggest that because the Yakama could travel within the ceded area free of taxes in 1855, the Treaty must allow them to do so now. Resp. 29-30. This argument proves too much. When the Yakamas traveled in their own territory in 1855, they could buy and sell goods without taxation. But that does not mean freedom from sales taxes became part of the highway-travel right; Cougar Den concedes that it did not. Resp. 35-36.

Finally, Cougar Den's argument mischaracterizes the treaty's negotiating history. The company repeatedly claims that Governor Stevens promised the Yakama "the 'same libert[y] outside the reservation' *as within it* 'to go on the roads to market.'" Resp. 6, 20 (alteration in original) (emphasis added). That is not what Stevens said. When Stevens said Yakamas would have the "same liberties outside the reservation . . . to go on the roads to market," he was saying that their off-reservation rights would be the same as those of the Nez Perce Tribe, whose rights he had just described. *See* Treaty Minutes, App. 70-71 (attached to Yakama Amicus Br.). He made this statement while listing other ways in which the rights of the Yakama would mirror those of the Nez Perce. *Id.* at 71. Cougar Den's description of his statement is unsupportable.

B. Washington's Fuel Tax Does Not Tax Travel by Public Highway

Unable to demonstrate the Yakama Treaty creates a right to transport goods without taxation of those goods, Cougar Den argues in the alternative that Washington's fuel tax is preempted because it

actually taxes the Treaty-protected right to travel by public highway. Its arguments fail.

Cougar Den first claims that Washington's fuel tax "is preempted regardless of whether it is a 'possession' or 'transportation' tax" because it is impossible to separate the two concepts. Resp. 28, 37. That is incorrect under Washington law, as the facts of this case demonstrate.

Cougar Den also argues that Washington's tax is preempted because one trigger for the tax is importation. Resp. 39-50. But the tax applies to fuel obtained inside and outside of Washington, and it applies to fuel that is imported by means other than public highway. Characterizing it as an "import tax" does not turn it into a tax on using public highways.

1. Washington's statutes tax fuel possession, not highway travel, and are not preempted

Cougar Den's argument depends on the false premise that Washington's fuel tax amounts to "taxation on travel." Resp. 29. It does not.

As the State and the United States explained in prior briefing, Washington taxes fuel possession, not fuel transportation. Opening Br. 6-9, 25-28; U.S. Br. 3-5, 18-21. The tax is assessed on the first possession of each gallon withdrawn from a refinery or terminal in the State or brought into the State. JA 119a-20a, 126a-28a; Wash. Rev. Code 82.36.020, .022, 82.38.030. The tax does not turn in any way on travel by public highway, as the Washington Supreme Court acknowledged. Pet. App. 13a.

Cougar Den's only response is to claim that it makes no difference whether the tax is on possession or transportation because "[p]ossession is inherent in transportation. It is impossible to transport something without possessing it." Resp. 36; *see also id.* at 3, 37-39. That argument misunderstands Washington law, as the facts of this case show.

Fuel possession and fuel transportation are distinct, separable acts under Washington's fuel tax statutes. When fuel enters the State, the "owner" of the fuel owes the tax, regardless of who transports it. Pet. App. 40a, 55a (citing Wash. Rev. Code 82.36.020(1), .100, 82.38.030(1)).

The facts here demonstrate this point. Cougar Den purchased fuel in Oregon, but hired a contractor (KAG West) to transport it into Washington. Pet. App. 52a-55a, 40a. KAG West transported the fuel, but Cougar Den owned it. *Id.* Because "[o]nly the owner of the fuel is subject to tax" under Washington law, it was Cougar Den, not KAG West, that owed the tax. Pet. App. 40a.

The point is *not* that Cougar Den loses because it hired someone else to transport fuel; it would make no difference if Cougar Den transported fuel itself. The point is that regardless of who does the transporting, Washington's tax is on fuel possession, not fuel transportation.

Given this, Cougar Den inadvertently concedes that it should lose. The company admits that "the State could tax an act that occurred *during* off-reservation highway travel, so long as that act is distinct from the highway travel itself." Resp. 36. That is the situation here. The State is taxing fuel

possession, and possessing fuel is distinct from transporting it, as Washington's statutes and the facts here show. Cougar Den's claim thus fails under its own theory.

2. Characterizing Washington's tax as an "import" tax does not turn it into a tax on highway travel

Equally unavailing is Cougar Den's argument that Washington's tax is preempted because one trigger for the tax is possessing fuel when it enters the State. Cougar Den asserts that "a tax *expressly* triggered by the exercise of treaty-protected activity is preempted," and that "importation" triggers the tax. Resp. 39. But even accepting these premises, Washington's tax is not expressly triggered by "travel upon all public highways."

To begin with, Cougar Den makes much of the state court's description of this tax as an "import tax." Resp. 40-42. The company claims that, under *Wagnon*, this description is dispositive. Resp. 43. But *Wagnon* deferred to state law as to "who" bore the tax and "where" it applied. 546 U.S. at 102, 103-09. Here, it is undisputed that the tax applies to Cougar Den and that its incidence is off-reservation. Pet. App. 4a-5a, 22a, 55a. Thus, the "frequently dispositive question[s]" at issue in *Wagnon* are undisputed here. 546 U.S. at 101. The question here, unlike in *Wagnon*, is whether the tax burdens the federal treaty right "to travel upon all public highways."

Washington's fuel tax does not burden the right "to travel upon all public highways" for the same reasons it is not a tax on travel. In particular, the tax does not depend, in any way, on use of public

highways. Pet. App. 13a. As the United States explained: "The fact that the first possession for some regulated parties will occur on a highway does not convert an excise tax on that possession into a tax on the use of the Highway . . . any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway." U.S. Br. 20.

Cougar Den's flawed response is that travel "is essential" to its tax liability under Washington's fuel statutes, while travel is merely "incidental" in the example above. Resp. 40. Not so.

First, it is not true that "Respondent's travel . . . is essential" to the imposition of the tax. Resp. 40. As the facts of this case show, Respondent is liable for the tax even when it does not travel at all, so long as it owns fuel entering the State.

Moreover, Cougar Den would owe the tax even if it imported fuel by means other than public highway. If, for example, Cougar Den used a private toll road to import fuel, it would still owe the tax. Similarly, Cougar Den would have owed the tax if it brought fuel into Washington via pipeline or barge. Cougar Den claims that the tax does not apply to fuel brought in by these means, Resp. 47, but that is true only if the importer has a State license and the fuel is on its way to a terminal or refinery, such that the tax will be collected later. Wash. Rev. Code 82.36.020(2)(c), .080(3). If the entry is by "bulk transfer," i.e., "by pipeline or vessel," Wash. Rev. Code 82.36.010(4), and "the importer is not a licensee," then

the tax applies when fuel enters the State. Wash. Rev. Code 82.36.020(2)(c)(i); Pet. App. 54a-55a ("Washington fuel taxes are imposed when fuel 'enters into this state' . . . if the entry is by bulk transfer and the importer is not a licensee."). Cougar Den was not a licensee and thus would have been taxed if it used these methods to import fuel. Even Cougar Den admits that the tax applies to deliveries by pipeline or barge in "unusual situations involving unlicensed entities." Resp. 47. Cougar Den fails to mention it was an unlicensed entity.

In short, even if Washington's fuel tax is an "import tax," it is not a tax on using public highways. Use of the highway was incidental to Cougar Den's tax burden, not "essential." Resp. 40. Cougar Den thus again loses under its own theory.

C. The Fiscal and Regulatory Concerns of the State and Its Amici Are Real

Cougar Den falsely claims the "sole practical issue" in this case is Washington's authority to tax fuel transported to the Yakama Reservation. Resp. 59. A State losing tens of millions in tax revenue is noteworthy on its own, but accepting Cougar Den's argument would have far broader impacts, jeopardizing a range of state taxes and regulations.

1. Ruling for Cougar Den would imperil many state taxes

If this Court rules that Yakama businesses can avoid taxes by transporting goods by highway, it will wreak havoc on state tax systems.

Starting with fuel taxes, ruling for Cougar Den would allow the company to ship untaxed fuel to over twenty-four Indian reservations in Washington that contain gas stations, which sell millions of gallons of gasoline annually.[7] Cougar Den could also ship untaxed fuel to reservation gas stations in other states, a practice other Yakama-owned companies are already attempting. *See Salton Sea Venture, Inc. v. Ramsey*, No. 11-cv-1968-IEG, 2011 WL 4945072, *7 (S.D. Cal. Oct. 18, 2011). Another Yakama-owned company, First American Petroleum, is advertising its ability to use the Yakama Treaty to gain an "economic advantage" on fuel deliveries to reservations nationwide. http://www.firstamericanpetro.com/about-us/.

Cougar Den's facile response is that the State could simply move the incidence of its fuel tax to consumers but is unwilling to do so for political reasons. Resp. 60. But the State already tried what Cougar Den proposes, and it was struck down by a federal court. *See Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). Even if the State tried again, putting the incidence on consumers raises two serious practical concerns. First, because the tax would be collected by thousands of fuel retailers rather than a much smaller number of large fuel companies, tax evasion would be a more serious threat. And second, this approach would impose painstaking recordkeeping obligations on Indian and non-Indian fuel retailers throughout Washington, precisely the sort of burdens that tribes have opposed in the past. There is no reason they should have to

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[7] Opening Br. 8 n.4.

bear this burden based on Cougar Den's unsupported treaty interpretation.

Moving beyond fuel taxes, Cougar Den's misguided approach would preempt any tax that turns on first possession in a state if the first possession occurs on the highway. There are many such first-possession taxes, and they serve important purposes. For example, when cigarettes enter Washington, the owner of the cigarettes must pay Washington's cigarette tax and affix stamps as proof-of-payment. Wash. Rev. Code 82.24.020, .040(2). Yakama-owned companies are already citing the decision below to argue that other states' cigarette taxes are preempted. *See* Br. & Special App. of Appellant-Cross-Appellee at 51-53 & n.21, *New York v. Mountain Tobacco Co.*, No. 17-3198/17-3222 (2d Cir. Feb. 20, 2018).

Cougar Den responds that States can simply change cigarette and other taxes to apply to "the off-reservation purchase or sale of goods." Resp. 61. But States have good reasons to structure their taxes as they have. For example, with cigarettes, taxing first possession, and requiring stamps as proof-of-payment, enables the states and federal government to track the movement of cigarettes and prevent tax-free contraband from being sold off-reservation, or on the reservation to non-Indians.

2. Cougar Den's reading threatens state regulations as well

Cougar Den claims its reading of the highway-travel clause would preempt only taxes, not regulations. Resp. 26-27. The distinction makes little sense.

Cougar Den cites no case holding that Indian treaties generally preempt taxes more readily than other laws. In fact, *Mescalero* held that the principle that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law" is "as relevant to a State's tax laws as it is to state criminal laws[.]" 411 U.S. at 148-49.

Nonetheless, Cougar Den contends that fishing-clause cases and *Yakama Indian Nation* establish that the Treaty preempts taxes but not rules "to protect public safety or to ensure the free and safe use of the highways." Resp. 26. Those cases do no such thing. Fishing-clause cases have distinguished taxes only from regulations "necessary for the conservation of fish," not regulations generally. *Tulee*, 315 U.S. at 684; *Fishing Vessel*, 443 U.S. at 682 ("[T]reaty fishermen are immune from all regulation save that required for conservation."). And *Yakama Indian Nation* cited fishing cases in saying only that the State could enforce laws "to preserve and maintain the condition of the roads." 955 F. Supp. at 1257.

These cases thus say nothing that would save many important state laws, such as public safety laws restricting possession of explosives, firearms, or drugs. If, as Cougar Den contends, the Yakama Treaty creates a right "to transport goods" by highway, there is no clear rationale allowing the State to prohibit Yakamas from possessing such dangerous goods on the highway. These cases also say nothing about state laws designed to protect the State's economy, *see, e.g.*, Opening Br. 44 (offering example of law to protect State's apple crop), or to protect the environment (such as vehicle emission standards).

Cougar Den's argument is also counter-intuitive. Under the company's theory, the State can ban transportation by highway of goods (like fuel) for public safety reasons, but cannot impose a generally applicable tax on those same goods if they happen to be transported by highway. There is no basis for such an absurd rule in the Treaty's text, history, or precedent.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General
Counsel of Record

JAY D. GECK
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
(360) 753-6200
noahp@atg.wa.gov

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